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Supreme Court of the United States

OCTOBER TERM, 1952

No. 563

JOINT ANTI-FASCIST REFUGEE COMMITTEE

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC., ET AL.

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners pray that a writ of certiorari issue to bring to this Court two cases pending in the United States Court of Appeals for the District of Columbia Circuit wherein the petitioners have on appeal judgments of the United States District Court for the District of Columbia denying plaintiffs' motions for preliminary injunction. (R. 58-59, 96-97).

OPINION BELOW

A single opinion was filed by the District Court (Morris, J.) in both of these cases, as well as in a companion case, *International Workers Order Inc.* v. *McGrath.* It is reported sub nom *Joint Anti-Fascist Refugee Committee* v. *McGrath,* at 104 F. Supp. 567. (R. 49-58).

SUMMARY STATEMENT OF MATTER INVOLVED

In November 1947, the Attorney General designated the complaining organizations on a list of subversive organizations purportedly made pursuant to Executive Order 9835. (R. 27-32). The petitioners filed actions seeking injunctions and declaratory judgments alleging that the action of the Attorney General was invalid. (R. 1-9, 60-73).

The respondents filed no answers to the complaint but filed instead motions to dismiss. These motions were granted by the District Court on the ground that the petitioners had not suffered any legal injury from the listing and therefore lacked standing to sue. (R. 12-13). The rulings of the District Court were subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.[1]

On writs of certiorari, this Court reversed the lower courts, holding that the petitioners had standing to sue and that the dismissals of the complaints were erroneous. The decision was by a divided court, five to three, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. Four of the majority justices expressly stated that the listing of the petitioning organizations by the Attorney General in the absence of adequate notice and hearing was invalid and unconstitutional. Justice Burton, although acknowledging that the case bristled with important con-

[1] The Joint Anti-Fascist Refugee Committee case was affirmed in *Joint Anti-Fascist Refugee Committee* v. *Clark,* 177 F (2d) 79. The National Council of American-Soviet Friedship case was affirmed without opinion, the Court relying on its opinion in the Joint Anti-Fascist case, *supra.*

stitutional issues (at 135), found it unnecessary to decide this issue on the state of the pleadings then before the Court, since the case had come upon a dismissal of the complaints and the government had not yet filed its answers. The three dissenting justices also did not reach this question since they agreed with the lower courts that the petitioners had no standing to sue.

Upon remand to the District Court, respondents filed their answers to the complaints. (R. 13-18, 73-81). The two answers are virtually identical. They admit that the listing of the organizations was done without any form of notice or hearing, but allege that the designations were made "after careful study" "on the basis of information in his [the Attorney General's] possession, including confidential investigative reports of the Federal Bureau of Investigation." (R. 16, 78-79). Other than this recital, the answers contain no factual allegations as to the basis upon which the designations were made. Moreover, despite the allegations of "careful study," the answers profess a complete lack of knowledge as to the character and activities of the petitioning organizations as set forth in the respective complaints. Thus, the answers plead a lack of knowledge as to the dates on which the petitioning organizations were formed, their purposes and aims, the nature of the material which they printed and circulated, the character of their meetings, and the individuals and public officials who participated in and addressed their functions. (R. 14-15, 74-80).

The petitioners thereupon filed motions for judgment on the pleadings, for summary judgment, and for preliminary injunction. (R. 34-35, 51, 82). In the case of the Joint Anti-Fascist Refugee Committee, the motion for preliminary injunction was a renewal of a motion filed at the time of originally filing its complaint, which motion was denied when the complaint was dismissed. (R. 10-13). In support of the motions for preliminary injunction and for summary judgment the petitioners filed affidavits substantiating in

detail all of the allegations of the complaints (R. 35-38, 83-89).

The respondents' opposition to these motions rested primarily upon the affidavits of the then Attorney General, J. Howard McGrath. (R. 39-44, 90-96). The affidavits, in each case, like the answers of the respondents, state that the designations of the petitioning organizations were made on the "basis of information in his [the Attorney General's] possession, including confidential investigative reports of the Federal Bureau of Investigation." (R. 40, 91). The affidavits then recite as follows: (emphasis supplied).

> "Much of the evidence and information upon which this designation rests is derived from confidential reports of investigations conducted by the Federal Bureau of Investigation. *Public policy and national security will not permit the disclosure of the contents of many confidential reports nor the presentation by way of testimony through witnesses of any of the confidential information contained in such reports* since such revelations would be detrimental to the national security and would render valueless for future use confidential sources of information essential to the protection of our national security.
>
> "Within the limits of national security, however, I submit the following summary of information upon which, in part, the designation of the . . . [petitioning organizations], pursuant to Section 3 Part III of Executive Order 9835, is based. This summary does not reflect the complete factual basis upon which the determination rests but only that part which can be disclosed . . . ." (R. 40-41, 91-92).

The affidavit in each case then sets forth in summary form allegations that the petitioning organizations were organized and controlled by the Communist Party. (R. 42-44, 93-94).

The respondents also filed in opposition to the motions for preliminary injunction an affidavit by Hiram Bingham, Chairman of the Loyalty Review Board, which alleged that granting of petitioners' motions for preliminary injunction would interfere with the administration of the government's loyalty program. (R. 45-48).

Petitioners moved to strike the affidavits of J. Howard McGrath on the ground that the affidavits did not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure that, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," and that "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." (R. 53-54).

After argument, the District Court filed an opinion on April 23, 1952, 104 F. Supp. 567. (R. 49-58). The court denied the motions of petitioners and respondents for summary judgment or judgment on the pleadings and also denied petitioners' motions for preliminary injunction. (R. 58-59, 96-97). In his opinion, the District judge acknowledged that on the pleadings before him it was conceded that the designation of the petitioning organizations had been made without notice and hearing. He refused, however, to determine whether or not such designation without notice and hearing rendered the action invalid and entitled petitioning organizations to relief. Thus, although he denied petitioners' motion for judgment on the pleadings, he reached this result by refusing to decide the question presented. According to the District Court the matter of whether or not notice or hearing was required before designation could validly be made was required to await a trial, although obviously a trial could not alter the undisputed fact that the organizations had been denied any opportunity for notice and hearing. In addition, the District Court, although reciting that petitioners had filed motions to strike the affidavits of J. Howard McGrath as insufficient under the rules, refused entirely to pass upon these motions. Nevertheless, the court referred to the affidavits in its opinion, and on the basis of the affidavits denied petitioners' motions for summary judgment.

The District Court recognized that the form of the affidavits by J. Howard McGrath posed the question as to whether or not the government could justify its listing solely on the basis of the Attorney General's statement that he had information in his possession which would support such a listing or whether in any event the government must at some stage support that designation by admissible evidence. The affidavits' professions of the inability of the government to present evidence because of the interests of national security, leaves a fair inference, and one which the government has never disclaimed, that it does not intend at any stage of this proceeding to support its designation by admissible evidence. Although recognizing that this question was posed by the pleadings and the affidavits on file, the court refused to resolve the question, suggesting that it too could be resolved at some future stage.

Thus the District Court refused to decide whether on the admitted facts petitioners were entitled to judgment, informed petitioners that they must await a trial before they could obtain a decision on facts which a trial would not change, and concluded that it did not know what issues would be resolved at such a trial.

Finally, the District Court denied petitioners' motions for preliminary injunction on the ground that the injury which the respondents' action had done to the petitioners, as recognized by this Court, had already taken place; and that whether or not the action of the respondents were illegal, an injunction against such actions "would . . . bring about a change in governmental procedures which had been in operation for a long period, and which ought not to be altered unless and until it is determined that the action in question is illegal and invalid." (at p. 572). (R. 58). In short, according to the District Court, petitioners would not be entitled to relief until and unless the respondents' acts were determined to be illegal and invalid. However, the District Court refused to exercise its judicial function to determine whether or not this action was invalid, in-

sisting that petitioners must first go to trial on issues which bore no relevance to a decision on this question and which the court was unable to define or delineate.

The petitioners noted an appeal from the District Court's denial of the motions for a preliminary injunction and docketed that appeal in the United States Court of Appeals for the District of Columbia Circuit on October 29, 1952.

On ~~March~~ November 7, 1952, the Court of Appeals entered orders substituting James P. McGranery as respondent in the place and stead of J. Howard McGrath (R. 100-101).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, sec. 1254(1).

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12F. R. 1935, issued March 21, 1947 appears in the record at pp. 18-26.

QUESTIONS PRESENTED

(1) Whether the action of the Attorney General in designating without notice and hearing, petitioning organizations as "subversive" organizations for the purposes of Executive Order 9835 violates the First and Fifth Amendments.

(2) Whether the denial of the plaintiffs' motions for a preliminary injunction was an abuse of discretion where on the admitted facts the plaintiffs were entitled to relief as a matter of law, and whether the trial court's refusal to pass upon an issue of law posed by undisputed facts constituted an abuse of discretion.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Issues

This court has already determined that the issues posed by this case are important ones requiring consideration and adjudication by this Court. The issues have already been argued and considered by this Court. Unfortunately, because of the state of the pleadings when these issues were earlier before this court, the decision of this court did not definitely adjudicate the case. *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.*

In its prior decision, four justices stated unequivocally that the denial by the Attorney General of a notice and hearing to the petitioning organizations rendered the listing invalid. One justice, Justice Burton, although recognizing the importance of the issue, held that he did not have to pass upon the constitutional issue posed in this petition because the pleadings had not at that time been closed. The government has now filed its answers admitting the denial of notice and hearing and the issue is ripe for adjudication.

II. The Trial Court Abused its Discretion

The trial court clearly abused its discretion. On the admitted facts before it, the trial court was required to decide the issue as to whether the Attorney General's denial of notice and hearing invalidated the listing. The trial court refused to pass upon this question at all, and relegated the petitioners to a trial which could in no way alter the admitted facts.

The trial court, moreover, although ignoring the legal issue before it which required adjudication on undisputed facts, denied the petitioners' requests for a preliminary injunction. It did this on the ground that after balancing the equities, it found that the public interest in the continued operation of the list by the government, outweighed the damage done to the petitioners. But if the action of the government which is challenged is, on the undisputed

facts, clearly illegal and unconstitutional, then there are no equities to be balanced, since there can be no overriding public interest in protecting the continuance of such illegal action. See Frankfurter, J. concurring in *Youngstown Sheet and Tube Co.* v. *Sawyer.* 343 U.S. 579, 596. If the petitioners were entitled to judgment on the pleadings as they stand, then there could be no conceivable equities which would justify a denial of a preliminary injunction.

The error was magnified, moreover, by the fact that there are no issues to go to trial. Presumably, a preliminary injunction should be denied only where it appears that a trial might result in a judgment for defendant. On the face of the government's affidavits, it appears that the government does not intend at any stage to introduce admissible evidence which would support the listing. The only question to be determined, therefore, is whether the affidavits would justify judgment for the government. The trial court recognized that this question was posed by the affidavits, but, in a mood of complete abdication of the judicial function refused to pass upon this question as well. Thus, as the case stands, not only would a trial not alter the undisputed facts that the Attorney General denied the petitioners notice and hearing, but there do not appear to be any issues at all which would be litigated at a trial.

The climax of the trial court's errors was reached in its holding that in balancing equities the damage inflicted, and still being inflicted, upon the petitioners by the illegal action of the Attorney General should be discounted because this damage had already been incurred for a number of years. But this damage had already been incurred for this period only because of the originally erroneous action of the District Court in dismissing the petitioners' complaints, an action which was reversed by this Court on review. Thus according to the District Court, damage incurred because of the District Court's denial to the petitioners of the relief to which they are entitled serves as a justification for a continued denial of such relief.

III. Why the Issues Should be Reviewed in This Case Prior to Decision of the Court of Appeals

In the *Joint Anti-Fascist case, supra,* Justice Burton, speaking for himself and Justice Douglas, said that the effect of the Attorney General's listing of the petitioning organizations was to "cripple the functioning and damage the reputation of those organizations" (at 139). Justice Black said that the "Attorney General's much publicized findings, . . . are the practical equivalents of confiscation and death sentences for any blacklisted organization" (at 142). Justice Frankfurter said (at 159), "Designation works an immediate substantial harm to the reputations of petitioners," and (at 161) "It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organization, if it does not proscribe them." Justice Douglas for himself said (at 175): "An organization branded as 'subversive' by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable." The dissenting justices, although denying that the petitioners were entitled to any legal redress, stated that they recognized that the designation of the petitioning organizations "impairs their ability to carry forward successfully whatever legitimate objects they seek to accomplish" (at 200).

The petitioning organizations instituted legal action in an effort to obtain redress for the severe and crippling damages inflicted upon them by the designation. At the outset they were met with a ruling by the District Court that they were not even entitled to access to the courts. The Court of Appeals for the District of Columbia affirmed, and the petitioners were compelled to come to this Court to obtain a ruling that they were even entitled to sue.

Upon remand to the District Court, the government filed answers in which it in effect conceded the essential allegation in the complaints of the petitioners, but insisted that it has a right to designate the petitioning organizations

without notice and hearing on the basis of confidential investigative reports of the Federal Bureau of Investigation. The District Court again denied the petitioners relief, refusing to decide either for or against the petitioners any of the legal issues presented by the pleadings and affidavits on file. Its course of action in effect amounted to an abdication of its judicial function in favor of a program of delay and continued frustration of the petitioners' rights. To climax its action, the District Court held that the petitioners were not entitled to relief at this stage because they have not been able to obtain such relief heretofore. Obviously, elementary justice and the severe damage the petitioners have incurred pending the delays of litigation accompanying one set of appeals to this Court require that the petitioners obtain their relief in less tortuous fashion. It is almost as if the actions of the lower courts were designed to wear the petitioners out with a view toward their complete destruction so as to prevent by a process of attrition their ever obtaining a final adjudication of their rights.

No useful purpose would be served and much harm would be done the petitioners by subjecting them to the further delays of an appeal to the Court of Appeals. This Court has already considered the issues involved in this petition. Four justices have already spoken on the question. Nor are there any factual questions which require analysis and determination. Under these circumstances, intermediate consideration of the issues by the Court of Appeals would be of no value as a guide to this Court. Moreover, the Court of Appeals for the District of Columbia has already expressed its views on the subject in this very case, *Joint Anti-Fascist Refugee Committee* v. *Clark*, 177 F (2d) 79, and has recently indicated, that even after considering this Court's opinion in the *Joint Anti-Fascist* case, it still adheres to those views ex-

pressed earlier. See *Kutcher* v. *Gray,* 199 F (2d) 783, 789, fn. 25.[2]

Until this Court determines the issues in these cases, the harm to petitioners is continuing in an aggravated degree. Not only is the list still being employed in the government's loyalty program, but it is increasingly being used as a general black-list, to the injury of the petitioners. Among the most notable of these instances have been its use as a test for state employment (see *Wieman* v. *Updegraff,* (— U.S. —, 97 L. ed. 162); its use as a condition for the occupancy of public housing (Independent Offices Appropriation Act, 1953, P. L. 455, c. 578, 82nd Cong., 2d Sess., sub title Public Housing Administration); its use as a condition for granting a commission in the armed services *Orloff* v. *Willoughby,* No. 444, this term); and its use as a basis to exclude aliens (*U. S. ex rel. Mezei* v. *Shaughnessy,* 195 F. 2d 964; *Shaughnessy* v. *Mezei,* No. 139, this term) and to deny discretionary relief from deportation (*U. S. ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489).

Under these circumstances, to require the petitioners once again to prosecute their appeals through the Court of Appeals would serve no purpose other than to continue the damage already done to the petitioners and further delay any effective relief.

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[2] The Court of Appeals for the Second Circuit has expressed the contrary view. The Second Circuit is of the view that this Court in fact invalidated the listing of "subversive" organizations in the *Joint Anti-Fascist* case. See *United States ex rel. Mezei* v. *Shaughnessy,* 195 F (2d) 964, 967.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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